

Some Brief Reflections of a Circuit Judge

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I. IT'S NEVER AS GOOD IN THE RERUNS

There's a reason no one will ever make a movie about the life
of an appellate judge.

—Judge John Peck, U.S. Court of Appeals for the Sixth Circuit

Judge Peck wasn't complaining when he made that observation to me (although his timing could have been better since he said it shortly after I was confirmed, but before I was sworn in as a judge on the Sixth Circuit). He was simply stating what becomes obvious after a few months on the court of appeals.¹ And while the fact is that movies aren't made about the lives of most judges at any level, at least on the trial court, drama, humor, and pathos are part of the weekly, if not everyday, experience of the court.

On the appellate court, nearly all of what the judges see is a rerun of what has first played live and in color in the trial court. But the reruns are condensed, edited, and produced in black-and-white.

The difference between trying a case on the district level court and merely reading the briefs on appeal is only a little less marked than the difference between watching *Gone With the Wind* and reading the *TV Guide* description of it. Imagine, for example, reading appellate briefs telling the judges that a criminal defendant is appealing his conviction for kidnapping the three-year-old daughter of the couple for whom he was employed as a housekeeper, that the defendant is a druid priest, and that the reason for the kidnapping was to take the child to Europe to be educated as a priestess. Even the most jaded appellate judge will probably take note of this case as being different from the usual fare. Some may not even recall ever having encountered a druid priest before.

But imagine the experience of the judge who tried this case, learning during the course of the trial that the defendant professed to consider himself bound by a string of tenets recorded in his "tomes," including "To thine own self be true;"² that his personal habits included taking only "seasonal baths;"³

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¹ I have always assumed that what Judge Peck meant was that the real activity is on the *trial* court, not that trial judges are better looking and more interesting than appellate judges. This may be clear error.

² A tip-off that the principles of this druid, at least, had expanded beyond the original.

that the "Inner Circle" and the "High Druids" had ordered him to take the child victim to Europe in order to educate her to become the "New High Priestess;" that he had elected to take her to Europe by way of West Virginia, stopping to see the Firefly Festival; and that there, across the bridge at Skeleton Run, while eating Kentucky Fried Chicken on his cousin's back porch, he was descended upon by a concatenation of federal, state, and local agents of the law, causing more excitement than Skeleton Run had seen for generations.

Even if the entire trial transcript had been included in the joint appendix on appeal, could the appellate court really have gotten from the printed page the flavor of this choice bit of testimony, without being able to see the defendant, fresh from an enforced nonseasonal bath (courtesy of the U.S. Marshals), proceeding *pro se* to cross-examine the child-victim's father? And the father, his hair flowing to his waist, responding solemnly to these questions? And the jury, listening to the father's answers in obvious amazement in the jury box?

- Q: Sir, are you familiar with an incident that occurred in October of 1983 at 112 Thrush Avenue? I believe it was the eve of your future wife's grandmother's funeral.
- A: Yes.
- Q: Could you describe this incident, please, for the Court and who was present?
- A: On that night, we were engaged in a game of Dungeons and Dragons. We had been drinking quite a bit. We took a break from the proceedings just to unwind and get our heads together. We scattered around. Some of us went outside, some of us went uptown for pop. During that time, you collapsed against a tree in my mother's front yard. On checking you I couldn't find a pulse or a heartbeat. I searched spiritually and found a trail that led down into the plains of hell, and with the assistance of some of my friends for spiritual backing, I followed you there and retrieved your soul. This was not done easily, but it was accomplished. As we came back, you basically came back to life and we went on with the night after a time.

No matter how much a trial judge transplanted to the appellate court may enjoy appellate work, I suspect that she must, as I do, look back rather wistfully from a pile of briefs and joint appendices at the unrehearsed and unexpurgated activity of the trial court. That brings me to the point of this piece, which is to impart some observations of a practical nature that I have

³ Apparently whether he needed them or not.

accumulated during my short experience on the Sixth Circuit regarding appellate briefs and their importance in the decisionmaking process.

II. DOG, DOG, BITE PIG REASONING AND SOME FINE POINTS OF APPELLATE BRIEF WRITING

The role of any judge is to make a principled decision in each matter that comes before the court. A principled decision has been aptly defined by Professor Herbert Wechsler as "one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."⁴ While Professor Wechsler was speaking in terms of loftier cases than those that comprise the day-to-day fare of most judges, his standard applies to every decision that a judge must make, lofty or mundane. The appellate judge must make these decisions without the benefit of seeing the witnesses testifying with composure or while squirming in their seats, or without hearing the stress or confidence in the inflections of their voices. Rather, the appellate judge must rely on the briefs, the arguments, and the record to formulate those reasons that "in their generality and neutrality" both support and transcend the particular result in the case at hand. The briefs and the argument are likely to be anything but neutral and general and certainly are expected to be directed primarily at the immediate result the parties seek in the particular case. And the briefs ordinarily will be the judge's introduction to the case. The importance of this first impression can hardly be overstated.

It is probably fair to say that there is, to some degree, a certain lack of empathy, or even sympathy, on the part of judge and lawyer for the demands of the other's job. As a practical matter, however, judges ought to be able to expect, and lawyers ought to strive to provide, appellate briefs that are tailored to the function they are supposed to serve, which is to educate the judge about the case the lawyers are presenting. Educating the judge, of course, means informing him of the facts material to the issues in the case and persuading him that one side is right and that the opposing side is not. In this Circuit, that education must take place in the context of the judge's preparation for roughly forty other cases that will be argued during the same two-week period. Inevitably, some of these cases begin to blur in the judge's recollection, despite diligent preparation.⁵

Are there ways in which the brief can make the case stand out in the

⁴ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959). I do not express any opinion on Wechsler's broader proposition regarding adjudication of constitutional issues.

⁵ In the words of a recent President, it "wouldn't be prudent" to believe the rumors that only the law clerks read the briefs.

judge's mind? There are. Those I have in mind help to make the case stand out in a positive way (although the flip side of most of them will also make the case stand out in the judge's memory) and are effective in helping the judge make the principled decision the judge seeks to make, as well as helping him reach the result which the brief's author seeks.

Brevity is not the most important aspect of a brief, but in moments of candor I would probably admit that it is hard to think of an attribute that is more important. Early in my career as a judge, one of my children inquired why these documents are called "briefs." Why, he asked, are they not called "lengthies?"

The more user-friendly and sophisticated word processors become, the greater the temptation must be to misinterpret the fifty-page limit of Federal Rule of Appellate Procedure 28(g) as a floor rather than a ceiling. By advocating brevity, I do not urge that facts or arguments be left out of the brief,⁶ but that they be stated only once. Briefs that are premised on the same theory upon which some people take medicine—"if a little will do a little good, a lot will do a lot of good"—are frequently doomed to the same result. The better premise is probably, as everyone's grandmother and Mattie Ross used to say, "Enough is as good as a feast."⁷

There are a number of ways to shorten a brief without sacrificing accuracy or quality. For example, if the appellant has accurately stated the case or the facts in his brief, there is no reason for the appellee to restate them; even if, as a matter of style, the appellee could do a more graceful job. The style points will rarely equal the appreciation the judge feels for the time savings that results from her knowing that the parties agree on the facts.

If for no other reason than pity for the judge, it is a good idea to avoid throwing into the brief everything including the kitchen sink when the case does not really involve the kitchen. Within the last year I have reviewed, in a tax case, a brief that provided a discourse on the history of workers' compensation laws, beginning with the origins of those laws in Germany; and, in a *Terry-stop* case, one that devoted thirty-five pages to the development of the law regarding probable cause, beginning with the Magna Charta. No matter how interesting such material is, when this Circuit has spoken directly to the actual issue at hand, some judges will not wade through such briefs and emerge at the end grateful for the education.

Whatever the advantages of brevity, organization is probably the most

⁶ When I was writing my first appellate brief, a senior member of my law firm advised, "Never leave out an argument that you can make in good faith, even if you don't think it has any chance of succeeding. You never know what silly argument judges will be persuaded by!"

⁷ TRUE GRIT (Paramount 1969).

important aspect of the brief. An argument that is broken into its component parts and that follows logically from point to point is persuasive. Including an outline of the arguments to be presented at the brief's outset is helpful to the judge, both in the initial reading of the brief and in its later use in detailed preparation for argument and in preparation of the opinion. Such an outline saves both time and frustration when the judge is looking for some particular piece of an argument; the alternative is often to search through an entire brief or argument to find the specific part sought.

Lack of organization is frequently the reason for lack of brevity. An Episcopal priest I once knew used to say that if a sermon was longer than fifteen minutes then the priest was using the congregation's time to figure out what he was trying to say. That truth readily translates to briefs.⁸ Organization in a brief relates both to the arguments themselves and to the manner in which they are presented. A Faulknerian stream of consciousness (I once struggled through a brief that contained a two-and-one-half page sentence without a single citation to authority) is an unfortunate choice of style for arguments aimed at educating the judge who, until these briefs, has had no knowledge of the case. When a judge is confronted with opposing briefs, one that is concise and organized versus one that masquerades as the Great American Novel, it is not difficult to predict which one he will find more persuasive.

Not long ago, after remarking to my law clerks that a particular argument in a brief was a classic in "dog, dog, bite pig" reasoning, I was compelled to purchase for my chambers *The Tall Book of Fairy Tales* to fill in the gap in the clerks' educations and to illustrate the importance of organization in legal arguments. According to the tale of *The Little Old Woman and Her Pig*⁹ a little old woman was sweeping her house one day when she found a crooked sixpence.

"What shall I do with this sixpence?" she thought as she polished it. "I know! I will go to market and buy a little pig."

So she did. But as she was coming home from market she came to a stile, and the pig refused to go over the stile.

The little old woman pleaded and scolded, but the stubborn pig just shook his head and dug his four hoofs into the ground.

Then the little old woman went on until she met a spotted dog. She said to the dog:

"Dog, dog, bite pig; Piggy won't get over the stile, and I shan't get home tonight."

⁸ And probably to opinions and law review articles as well.

⁹ *The Little Old Woman and Her Pig*, in *THE TALL BOOK OF FAIRY TALES* 92, 92-93 (Harpers Collins 1972) (1944).

But the spotted dog would not help. So the little old woman went a little farther until she met a big stick. She said to the big stick:

"Stick, stick, beat dog; dog won't bite pig; piggy won't get over the stile, and I shan't get home tonight."

But the big stick would not help. So the little old woman went a little farther, and she met a fire. She said to the fire:

"Fire, fire, burn stick; stick won't beat dog; dog won't bite pig; piggy won't go over stile, and I shan't get home tonight."¹⁰

The old lady finally did get the dog to bite the pig and the pig to go over the stile, but you get the point. Unless the aim is to put the judge to sleep, torturing an argument through every excruciating detail to arrive at the kicker is not the way to present the case.

Hard on the heels of organization comes clarity. The thesaurus lists "precision" as a synonym of "clarity;"¹¹ it does not list "forthrightness,"¹² but I would include it as an aspect of clarity for purposes of writing briefs. Undoubtedly, in the practice of law there are occasions when there is no substitute for a little ambiguity.¹³ It is hard, however, to imagine such a situation when writing a brief for a court of appeals; ordinarily the last thing a lawyer wants to do in the court of appeals is to leave the judges to speculate about what he means. Somewhere between the obtuseness of the Internal Revenue Code ("For purposes of paragraph (3), an organization described in paragraph (2) shall be deemed to include an organization described in section 501(c)(4), (5), or (6) which would be described in paragraph (2) if it were an organization described in section 501(c)(3)")¹⁴ and the stunningly forthright motion for rehearing filed by a *pro se* prisoner civil rights litigant ("The court's de novo review obviously was perplexing leaving you maggots in a state of racist intrigue . . . so I want you m____-f_____ to pay close attention because I'm only going to tell you once") lies clarity.

Somewhat related to clarity is tone. While one goal of the brief is to cause the case to stand out in the memory of the judge, it is better not to achieve that result for the wrong reasons. So, for example, unless it is actually material to the issues on appeal, it is usually not a good idea to point out the shortcomings of opposing counsel, since to do so risks arousing skepticism in the judge as to the rest of the brief. If opposing counsel's conduct or character is material to

¹⁰ *Id.*

¹¹ See WEBSTER'S COLLEGIATE THESAURUS 139 (1976).

¹² See *id.*

¹³ That same senior partner in my law firm was famous for sending final letters to people who owed his clients money, predicting darkly that "if you fail to pay this debt you will have only yourself to blame for what happens to you next."

¹⁴ 26 U.S.C. § 509(a) (1988).

the appeal, it is nice to be subtle in raising the issue. Rather than referring to opposing counsel as being “like the Hydra—destroy one head and another simply grows back to replace it;” try, “Counsel insisted on pursuing this point in spite of several orders from this Court that are *res judicata* on the issue” Recently, I came across a somewhat more discreet approach to setting forth a claim that opposing counsel could not argue excusable neglect; first, the brief quoted a footnote from the district court’s opinion expressing that court’s doubts about the excuse given by opposing counsel for not responding to several motions and then characterized the court’s footnote as “a cross between ‘fool me once, shame on you, fool me twice, shame on me,’ and Proverbs 6:6.”¹⁵ And if opposing counsel’s argument really is, as another brief indelicately put it, “about as appropriate as tits on a boar hog,” it is usually preferable to assume that the judge will be able to discern this on her own.

A good advocate often can convince himself of the merit of his client’s cause, even in the face of formidable odds in the form of case law to the contrary. And every judge below the level of the Supreme Court knows that her opinions, no matter how strongly held and well-reasoned, are subject to being found erroneous. I would urge caution, however, in pointing out as one brief did that a particular decision rendered by a panel of the court is “absurd.” Even if the decision is, in fact, absurd, there is always the possibility that the very judge who wrote it will be reading the brief and will view such a characterization of his handiwork with disfavor. Substitutes such as “interesting,” “unusual,” or even “isolated” can make the point admirably well without reflecting so directly on counsel’s view of the abilities of the judge. By the same token, I also urge caution in including in a brief invitations to the judge to respond to such rhetorical speculations as “why the district court might possibly think that the appellant was trying to make such a foolish argument is unknown to the appellant.”¹⁶

There is also the seemingly obvious but often ignored point that it is helpful to cite to case law from the court in which you happen to be arguing. While preparing for argument in a recent sitting, I read a brief in which virtually every citation was to Tenth Circuit case law.¹⁷ I yield to no one in my appreciation of the natural wonders of Utah, Colorado, and the other states that comprise the Tenth, but since the Sixth Circuit had not been silent on the issue in that case it gave me a moment of serious pause about the attorney’s understanding of where his case was being argued. And when, as is sometimes the case, this circuit has clearly spoken on an issue, it is not helpful to inform

¹⁵ “Go to the ant, thou sluggard; consider her ways and be wise.” *Proverbs* 6:6.

¹⁶ In this particular case, the answer was clearly demonstrated in the brief.

¹⁷ I do not mean to single out the Tenth Circuit whose learned opinions have, on occasion, cited with approval an opinion of mine.

us that a state appellate court in Arkansas reached the same conclusion. It is even less helpful to tell us that the Arkansas court reached a different conclusion. This is not to say that judges do not recognize that in some situations a state appellate court from a distant jurisdiction might be the only court ever to agree with a given position; however, this may be a good clue that counsel ought not put many of her argument eggs in that particular basket.

This set of observations would not be complete without the inclusion of a couple of intensely practical points having to do with attention to detail in the brief. The first of these deals with citations to the record. In the Sixth Circuit, the contents of the joint appendix are governed by local rule. Some parts of the record are required to be included in the joint appendix, while others are optional. When the judges assigned to hear a particular case receive the case for review prior to argument, they receive the briefs of the parties and the joint appendix. They do not receive the entire record of the proceedings in the district court unless they specifically request it, and even then there are logistical problems if more than one judge makes that request. Citations in the brief to portions of the record that are not included in the joint appendix are therefore not helpful; if it is important enough to be cited in the brief, it is important enough to be included in the appendix. And since citations to the portions of the record that are contained in the appendix are much more easily usable if they are to the appendix page number rather than to the page number in the record, citing to the appendix page whenever possible is appreciated.

Second, many lawyers are not aware that federal judges have the Supreme Court Reporter in chambers but do not have the United States Reports. Briefs that include citations to the former are also greatly appreciated.

One final observation. Every lawyer knows that lawyers take their clients and the facts of their cases as they are. While it is the job of the advocate to take advantage of every strength and to attempt to minimize every weakness of his client's case, it is also his job not to attempt to make the case into something that it is not. During my first year as a district judge, my courtroom deputy gave me a little sign which I keep on my desk. (I do not speculate about exactly *why* she gave me the sign, but I like it.) It admonishes, "Never try to teach a pig to sing. It wastes your time and annoys the pig." The analogy here is not so much that appellate judges cannot be taught to sing as that they may be annoyed by attempts to persuade them that a case is what it plainly is not.

III. EPILOGUE

There is an understandable tendency among judges and lawyers alike toward the belief that “reading a boring brief,” like committing suicide in Buffalo,¹⁸ is redundant. Since the average appellate judge¹⁹ spends forty-two percent of his life reading briefs (leaving only fifty-eight percent for eating, sleeping, hearing oral arguments, writing principled decisions, cooking and playing golf), those briefs that are organized, to the point, shorter than their authors would really like to make them, and easy to use are also the ones that catch the judge’s attention, keep his attention, and keep him awake. What more could a judge ask of a rerun?

¹⁸ “To commit suicide in Buffalo is redundant.” A CHORUS LINE (Columbia 1985).

¹⁹ Of course there are none of those in this Circuit. Like the children of Lake Wobegone, this Circuit’s judges are “all above average.”

